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No. 92-1692

In the Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF ELY, ET AL., PETITIONERS

v.

FRIENDS OF THE BOUNDARY WATERS WILDERNESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred by concluding that the term "feasible" in Section 4(g) of the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1651 (1978), means "physically possible."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 978 F.2d 1484. The decision of the district court (Pet. App. 21a-37a) is reported at 770 F. Supp. 1385.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1992. A petition for rehearing was denied on January 26, 1993. Pet. App. C, 37a. The petition for a writ of certiorari was filed on April 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the Forest Service's decision to permit the continued use of motor vehicles to transport boats over three strips of land in the Boundary Waters Canoe Area Wilderness (BWCAW), which lies within the Superior National Forest in Northern Minnesota. Two of the three strips of land in question—the "Prairie Portage" and the "Trout Lake Portage"—are each about one half-mile long, while the "Four Mile Portage" is four miles long. Pet. App. 2a-3a. In 1978, Congress enacted the Boundary Waters Canoe Area Wilderness Act. Section 4(g) of that Act directed the Secretary of Agriculture to close the three motorized portages on January 1, 1984, "unless the Secretary determines that there is no feasible nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages." Act of Oct. 21, 1978, Pub. L. No. 95-495, § 4(g), 92 Stat. 1651.

The Chief of the Forest Service ultimately determined that there is no feasible alternative to motorized portaging. Pet. App. 56a. That decision followed testing of nonmotorized portaging on the three strips of land by a dozen teams consisting of persons in above-average physical condition. Although most of the participants "were above the 90th percentile of fitness" and "a spirit of competition developed" between the teams, *id.* at 60a, about one-quarter of the attempts to transport boats across the portages without motorized assistance failed, *id.* at 60a-62a. The report prepared by the physiologists who monitored the testing concluded that the level of effort required to transport boats without motorized

assistance "is certainly beyond that which is considered safe and prudent." *Id.* at 63a (quotation marks omitted). After reviewing that report, the Chief determined that nonmotorized portaging was not feasible for average visitors to the Boundary Waters Canoe Area Wilderness because "there is [a] considerable risk to their health and safety." *Id.* at 59a.

2. The respondents—various environmental organizations—brought suit challenging the final decision of the Chief of the Forest Service. They argued that so long as some people are physically able to transport their boats across the portages without motorized assistance, nonmotorized portaging is "feasible" within the meaning of Section 4(g) of the Boundary Waters Canoe Area Wilderness Act. The district court granted summary judgment in favor of the government after concluding that the term "feasible" is ambiguous and that the Forest Service had provided "a permissible construction of the BWCAW Act." Pet. App. 36a.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-12a. It held that "feasible" in Section 4(g) "means 'capable of being done' or 'physically possible.'" Pet. App. 9a. Since the Forest Service's test showed that some persons could transport boats across the portages without motorized assistance, the court held that nonmotorized portaging is "feasible" on the three strips of land at issue because it is "physically possible." See *id.* at 4a-5a, 6a.

Judge Magill dissented. Pet. App. 13a-20a. In his view, the meaning of "feasible" is not clear from the Act or its legislative history, and the court therefore should "defer to the Forest Service's reasonable decision." Pet. App. 20a.

Both petitioners and the government sought rehearing and rehearing en banc. The Eighth Circuit denied those petitions, with four judges dissenting. Pet. App. C, 37a.

ARGUMENT

Although we believe the court of appeals erred, we do not believe review by this Court is warranted, because the court's error is limited in its effect.

As an initial matter, we agree with petitioners that the Eighth Circuit erred in holding that the word "feasible" as used in Section 4(g) of the Boundary Waters Canoe Area Wilderness Act necessarily means "physically possible." As the court of appeals recognized, "feasible" may also mean "reasonably possible," Pet. App. 7a, and that is the interpretation the Secretary employed here. As the statutory language indicates (and as the legislative history of the Act confirms), Congress could not reach agreement concerning whether the three motorized portages at issue should be closed, so it directed the Secretary of Agriculture to determine whether nonmotorized portaging is "feasible." At the Secretary's direction, the Chief of the Forest Service reasonably determined that nonmotorized portaging is not "feasible," because one-quarter of a group of exceptionally fit teams could not accomplish the task. As Judge Magill concluded in dissent, the court should have deferred to the Chief's interpretation and application of Section 4(g). See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Nevertheless, review by this Court is not warranted. The question presented concerns the interpretation of one word in one Act that affects one

wilderness area lying entirely within one regional circuit. Thus, this case involves the first, last, and only appellate interpretation of the word "feasible" as that word is used in Section 4(g) of the Boundary Waters Canoe Area Wilderness Act. Contrary to petitioners' contention (Reply Br. 4), we do not think that the court of appeals held that, under *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), "feasible" means "physically possible" each time it appears in the United States Code. Rather, the court of appeals stressed that "Section 4(g) requires termination of motorized use of the portages unless the Secretary determines that there is no feasible motorized means of transporting boats across the portages," Pet. App. 8a, and held that, in light of the wilderness purposes to which the Act requires the land to be put, "feasible" should be given a narrow reading in Section 4(g). Similarly, the court of appeals did not decline to follow *Chevron*; it simply misapplied *Chevron* by concluding "that 'Congress has directly spoken to the precise question' at issue." Pet. App. 8a (quoting *Chevron*, 467 U.S. at 842).

Finally, while we disagree with the court's conclusion that "feasible" should be construed narrowly, we do not agree with petitioners' contention that "feasible" must be given a broader meaning so as to avoid a construction of Section 4(g) that would, in petitioner's view, effect an uncompensated taking of the property of the motorized portaging operators or of other vendors in the Boundary Waters Canoe Area Wilderness. Petitioners did not present a taking argument in the court of appeals. Moreover, any claim that there has been an uncompensated taking would be completely lacking in merit. We know of no

case—and petitioners have cited none—suggesting that the businesses operating in the Boundary Waters Canoe Area Wilderness have a property right protected by the Fifth Amendment to have the government continue to allow motorized transportation across public land in those wilderness surroundings. Petitioners' belated invocation of the Fifth Amendment therefore does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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